

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 4, 2009 Session

DEBRA CORPIER STOCKMAN v. GAYLON LAMAR STOCKMAN

Appeal from the Chancery Court for Giles County
No. 3998 Jim T. Hamilton, Chancellor

No. M2009-00552-COA-R3-CV - Filed February 22, 2010

In this divorce proceeding, Husband challenges the trial court's awards of spousal support, child support, and attorney's fees. Finding that the evidence preponderates against the court's findings regarding the parties' voluntary underemployment, those findings are reversed and the award of child support is vacated and remanded for reconsideration; the award of spousal support is also vacated in part and remanded for reconsideration. Finding that the court abused its discretion in setting the amount of attorney's fees awarded, that award is vacated and remanded for reconsideration.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Vacated in Part, Reversed in Part and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Thomas Wesley Hardin and Wesley Mack Bryant, Columbia, Tennessee, for the appellant, Gaylon Stockman.

Paul A. Bates, Lawrenceburg, Tennessee, for the appellee, Debra Corpier Stockman.

OPINION

I. Factual and Procedural Background

Debra Stockman ("Wife") and Gaylon Stockman ("Husband") were married on September 14, 1985. The parties separated in May 2007 and on November 16, 2007, Wife filed a complaint for divorce on the grounds of inappropriate marital conduct and irreconcilable differences; at the time of the divorce, the parties had two children, one of

whom was a minor. On January 9, 2008, Husband filed an answer and counter-claim for divorce on the grounds of inappropriate marital conduct and irreconcilable differences.

A trial was held on September 23 and 26, 2008, and the trial court entered a document styled “Judgment” on October 10, 2008, (1) finding that both parties were entitled to a divorce on the grounds of inappropriate marital conduct; (2) designating Wife as primary residential parent of the minor child¹; (3) determining Husband’s earning capacity/income potential to be \$144,066.86 for purposes of calculating child support; (4) ordering Husband to pay \$2,000.00 per month as rehabilitative alimony for 36 months; (5) setting Husband’s child support obligation at \$1,205.00 per month; and (6) ordering Husband to pay \$15,000.00 as alimony *in solido* to Wife for a partial award of attorney fees.

On November 3, 2008, Husband filed a Motion to Alter or Amend, asserting, in part pertinent, that the evidence did not support a finding that Husband’s earning capacity/income potential was \$144,066.86; that the court failed to consider Wife’s willful underemployment; that the evidence did not support a finding that Wife was in need of rehabilitative alimony; and that the award of attorney’s fees as alimony *in solido* was inappropriate.

In an order entered on January 8, 2009, the trial court denied Husband’s motion in regard to earning capacity and, in so doing, found that Husband was willfully underemployed and that Wife was not willfully underemployed; the court determined that Wife’s earning capacity was \$18,500.00 per year. The court granted the motion in regard to rehabilitative alimony and awarded Wife \$1,500.00 per month in transitional alimony for 36 months. Lastly, the court modified the award of attorney’s fees by ordering Husband to pay one-half of Wife’s attorney’s fees as alimony *in solido*. A Final Judgment, incorporating the October 10 judgment and the January 9 order, was entered on March 2, 2009; attached to the Final Judgment was a Parenting Plan and Child Support Worksheet. On March 2, Wife filed a motion asking the court to “state a numerical figure representing one-half of the attorney fees incurred by [Wife].” In an order entered on April 3, 2009, the trial court set the award of attorneys’ fees to Wife at \$25,471.87.

Husband appeals, raising the following issues:

1. Whether the trial court erred in imputing income to Husband and failing to impute income to Wife for child support and alimony purposes.
2. Whether the trial court erred in its award of \$1,500.00 per month in transitional alimony to Wife.

¹ The minor child was 13 years old at the time of trial.

3. Whether the trial court erred in its award of \$25,471.87 as alimony *in solido* for one-half of Wife's attorney's fees.

II. Analysis

A. Voluntary Underemployment

Husband contends that the evidence supports a finding that he was not voluntarily underemployed and that the trial court erred in setting his earning capacity at \$144,066.86 per year for purposes of child and spousal support. He also contends that Wife was voluntarily underemployed and that the court erred by not imputing additional income to her.

"Willful and voluntary underemployment can impact the amount of child support and alimony to be paid." *Lightfoot v. Lightfoot*, No. E2001-106-COA-R3-CV, 2001 WL 1173297, at *6 (Tenn. Ct. App. Oct. 4, 2001). In considering whether a parent is willfully and/or voluntarily underemployed or unemployed, the regulations include the following guidance, in part pertinent:

The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed. The purpose of the determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children.

Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii).

Once a determination of underemployment is made, Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)(II) provides that:

[A]dditional income can be allocated to [a] parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:

- I. The parent's past and present employment; and
- II. The parent's education and training.

Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)(II).

“In making its determination, the trial court must consider the party’s past and present employment and whether the party’s choice to accept a lower paying job was reasonable and made in good faith.” *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001); Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)-(iii). “Although...a person has a right to pursue happiness and to make reasonable employment choices, an obligor parent will not be allowed to lessen his child support obligation as a result of choosing to work at a lower paying job.” *Willis*, 62 S.W.3d at 738. “The burden is on the custodial parent to show that the obligor parent is willfully and voluntarily underemployed.” *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003). “Determining whether a parent is willfully and voluntarily underemployed and what a parent’s potential income would be are questions of fact that require careful consideration of all the attendant circumstances.” *Richardson v. Spanos*, 189 S.W.3d 720, 726 (Tenn. Ct. App. 2005). Since this is a factual question, we accord the trial court’s findings of underemployment “a presumption of correctness, unless the preponderance of the evidence is otherwise.” *Id.* at 737-38; Tenn. R. App. P. 13(d).

1. Husband’s Voluntary Underemployment

Husband graduated from Mississippi College in 1984 with a degree in computer science. After graduation, he worked for Computer Sciences Corporation, Quality Research, Science Applications Technology International Corporation (“SAIC”), and Analytical Services Incorporated, performing “programming” and “systems administrations for computer systems.” Husband testified that, after he was laid off from Analytical Services, he accepted a contract position with COLSA Corporation while he searched for full-time employment; Husband circulated “a dozen to two dozen” resumes and contacted people he knew. Husband obtained two job offers, one in Virginia and the other with his current employer, Huntsville Hospital, in August of 2006 and testified that he accepted the job with Huntsville Hospital as a network security officer “manag[ing] e-mail systems and clinical applications for patient care” because his six-month contract with COLSA was expiring and he had no savings. At the time of trial, Husband worked ten to twelve hours a day and on weekends and testified that he is “on call pretty much twenty-four hours.”

In February of 2000, Husband started a company called Future Home Automation, Inc. (“FHA”), which involved installing “security systems, lighting control..., smart home technology..., cameras, computer networks..., [and] whole house audio”; he is the sole stock holder in the company. Husband worked at FHA part-time in addition to his full-time employment, but testified that he anticipated, at some point, making FHA his full-time job. However, Husband suffered a pulmonary embolism in September of 2006, which caused him to be hospitalized for two one-week periods, affected his breathing, and limited his physical activity. He testified that he was also prescribed a blood thinner to be taken daily, which made it dangerous if he were cut.

As a result, Husband decided to reduce his work with FHA because he realized that, if FHA was his sole source of income and he were hospitalized again, “there would be no income coming in and no way to pay the bills or support anybody.” Husband testified that his work at FHA “was a manual...job where [he] could wind up cutting [him]self” and that his income with FHA was “based on market and client wants and needs” and was “not really...consistent.” He maintains the business license and insurance for FHA because he still services existing clients but stated that FHA is no longer accepting new business. Husband introduced FHA’s 2007 federal and state tax returns, which revealed that the business operated at a loss of \$7,034.00 for the year. The trial court determined, based on Husband’s 2006 W-2 form, that Husband received \$51,506.86 in income from FHA for that year.

Wife asserts that the timing of Husband’s decision to decrease his work with FHA in relation to the filing of the complaint for divorce, the lack of evidentiary support for Husband’s testimony regarding his medical limitations, and the court’s finding that Husband lacked credibility support her contention that Husband voluntarily reduced his income to lower his support obligation.

The trial court found the following in regard to Husband’s earning capacity:

...[Husband] is willfully underemployed. [Husband’s] credibility is lacking and the Court questions the timing of [Husband’s] shutting down of his business, Future Home Automation, which occurred shortly before the filing of the divorce complaint, with apparently no discussion with [Wife]. The Court therefore finds that [Husband’s] earning capacity is \$144,060.96 annually (\$92,560.86 plus \$51,500.00). The aforesaid amount shall be used for the purposes of calculating child support.

Upon a review of the record, we find that the evidence preponderates against the trial court’s finding that Husband was voluntarily underemployed. After being laid off from Analytical Services, Husband conducted a thorough search for comparable employment in the computer science field; his job with Huntsville Hospital is in line with his education and work experience and his salary is within the range of income he previously earned. In regard to FHA, Husband testified that he intended to eventually work there full-time; once he suffered the pulmonary embolism, however, he abandoned this goal. He testified without contradiction that the decision to reduce his involvement with FHA and to continue his full-time employment at Huntsville Hospital was made in order to maintain a job with a guaranteed source of income instead of the uncertain income available with FHA, which was more dependent on the economy and clients needs; that he was concerned about FHA being his sole source of income if he needed another hospitalization that prevented him from working; and that his decision to reduce his work at FHA was due to the risks associated with

the effect of the pulmonary embolism, including the daily blood thinning medication and the physical limitations placed upon him.

The only factual basis cited by the court for its determination that Husband was underemployed was the timing of Husband's decision to shut down FHA. Further, while we give great deference to the court's determinations on matters of witness credibility *see Frazier v. Frazier*, No. W2007-00039-COA-R3-CV, 2007 WL 2416098 at *2 (Tenn. Ct. App. Aug. 27, 2007), such deference is not warranted where credibility determinations are contradicted by clear and convincing evidence. *Id.* In this regard, the court does not state the basis upon which it determined Husband's credibility to be "lacking."

We find that Husband's explanation regarding the timing of, and reasoning behind, his decision to reduce his work with FHA is supported by clear and convincing evidence. Husband suffered the pulmonary embolism about a year before the complaint for divorce was filed. As a result of the embolism, Husband decided to maintain employment with a guaranteed source of income, as opposed to uncertain earnings, and to avoid an increased risk of injury at FHA. Wife presented no evidence to prove that the timing of Husband's decision was done to lower his support obligation, and not as a result of the pulmonary embolism, or that contradicts the medical risks and limitations testified to by Husband, as is her burden in showing Husband's alleged underemployment. *Demers, supra*. We do not presume that Husband was wilfully underemployed and find his actions to be reasonable under the circumstances to ensure his ability to support his children. *See* Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii); *Willis*, 62 S.W.3d at 738.

The court's finding that Husband was voluntarily underemployed is reversed and the imputation of income to Husband is vacated; for purposes of calculating child and spousal support, Husband's income will be the \$92,560.86 per year salary he is earning with Huntsville Hospital.

2. Wife's Voluntary Underemployment

Wife graduated from Middle Tennessee State University in 1981 with a degree in business administration and accounting. Wife worked for Computer Sciences Corporation as a project control analyst full-time from 1984 until the parties' first child was born in 1988, at which point Wife worked part-time. Wife was promoted to a project control manager for the last year and a half of her employment with Computer Sciences before she went to work for Quality Research in June of 2001 as a project control analyst. In February 2003, Quality Research was bought by SAIC; Wife continued to work at SAIC part-time earning \$25,000.00 per year. In August of 2006, after Husband lost his job, Wife asked SAIC if she could work full-time so that her family would have medical insurance and other benefits;

Wife was allowed to work full-time until she was involuntarily laid off in January of 2007. Wife testified that, while working full-time, she was paid an hourly rate of \$30.00 and that she worked 40 hours per week, amounting to roughly \$60,000.00 per year.

After leaving SAIC, Wife testified that she “checked the job market for [the] accounting profession” and that she filled out two applications for job positions; one was for a job with Athens State University as an executive assistant to the vice president of student relations and the other for an Internet position working with a former colleague. Wife testified that she sent out one resume, did not do “anything online or on the computer to advertise [her] work experience, or skills,...education, [or] background,” and did “nothing as far as the job search is concerned, other than the two [applications].” Wife is currently employed at Elkmont High School, where she counsels students and maintains student records; she earns \$18,500.00 per year and works 10 months out of the year. Wife testified that she discussed with Husband the possibility of her working in a rewarding position, such as education, and that he “encouraged [her] to...go talk to the principal.” In deciding to accept the position with Elkmont High School, Wife stated that Husband voiced concerns regarding the parties’ finances, but did not tell her not to take the job.

Husband introduced Wife’s Social Security Statement as of May 12, 2006, which showed Wife’s annual income dating back to 1974. The Statement revealed that Wife earned \$47,751.00 in 2000, \$36,559.00 in 2001, \$15,334.00 in 2002, \$30,483.00 in 2003, \$25,630.00 in 2004, and \$11,774.00 in 2005. On her Income and Expense Statement, also introduced at trial, Wife stated her current monthly income to be \$1,112.51.

The trial court found the following in regard to Wife’s earning capacity:

The Court does not find [Wife] willfully underemployed. [Wife’s] credibility is much more believable as it relates to the decision not to seek a job in her field after being laid off from her accounting position in the defense industry. [Wife] testified that this decision was a mutual decision between the parties to enable [Wife] to spend more time at home with the minor child. This Court therefore finds that the earning capacity of [Wife] is \$18,500.00 annually.

Upon a review of the record, we find that the evidence preponderates against the trial court’s finding that Wife was not voluntarily underemployed. Wife’s background and experience are in the accounting field where she was earning about \$60,000.00 per year full-time before accepting the non-accounting position with Elkmont High School for \$18,500.00 per year. Wife testified that, after she was laid off from her last accounting job, she submitted two applications for employment, neither of which were in the accounting field. Based upon Wife’s past and present employment and her education and training, Tenn.

Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)(II); *Willis*, 62 S.W.3d at 738, coupled with her failure to conduct a thorough search for comparable employment, we find that she is voluntarily underemployed in her position with Elkmont High School.² The best evidence of Wife's earning capacity was her prior years' annual earnings as reflected in her Social Security Statement. *See Brooks v. Brooks*, 922 S.W.2d 403, 407 (Tenn. 1999) (holding that "since the record in this case contained [father's] tax returns for the years 1991, 1992, 1993, 1994, and 1995, the Court of Appeals erred in concluding that reliable evidence of [father's] earning potential was not in the record."). Wife's Social Security Statement reflected that she earned an average of \$28,000.00 per year during 2000-2005 when she was employed part-time as an accountant and we find this figure to be an appropriate earning capacity for her. In so holding, we have taken into account the potential conflict between Wife working full-time and her role as primary residential parent of the parties' child and, consequently, have chosen the average of Wife's part-time income as her earning capacity. The trial court's finding that Wife was not voluntarily underemployed is reversed and an earning capacity of \$28,000.00 per year is imputed to her for purposes of calculating child and spousal support on remand.

B. Transitional Alimony

Husband asserts that the trial court erred in its award of transitional alimony, contending that Wife did not have a need for, nor did he have the ability to pay, spousal support and that the statutory factors weigh against an award. Upon our review of the record, we have determined that an award of transitional alimony to Wife was appropriate and affirm the court's judgment in that regard. Based on our previous ruling regarding the parties' earning capacity, however, the trial court's determination of the amount and duration of the award must be remanded for reconsideration.

Whether to award alimony is within the sound discretion of the trial court in light of the particular circumstances of each case. *Riggs v. Riggs*, 250 S.W.3d 453, 456-57 (Tenn. Ct. App. 2007)(citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). Alimony decisions require a careful consideration of the relevant factors in Tenn. Code Ann. § 36-5-121(i) and typically hinge on the unique facts and circumstances of the case. *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007); *see also Anderton v. Anderton*, 988

² While Wife's acceptance of the lower paying, non-accounting position with Elkmont High School may have been a mutual decision between the parties, Wife's earning capacity, for purposes of calculating the amount of child and spousal support, is based upon her education and experience. Since Wife's education and the majority of her experience is in the accounting field, her earning capacity will be based upon this employment.

S.W.2d 675, 683 (Tenn. Ct. App. 1998). The relevant factors to be considered under Tenn. Code Ann. § 36-5-121(i) when determining whether to award alimony include:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i).

While a trial court should consider all the relevant factors under the circumstances, the two most important factors to be considered are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs*, 250 S.W.3d at 457 (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002)); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Oakes*, 235 S.W.3d at 160. When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Riggs*, 250 S.W.3d at 457 (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). Appellate courts will not alter such awards absent

an abuse of discretion. *Id.* Moreover, the appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

In the Final Judgment, as in the October 2008 Judgment, the trial court determined that Wife had a need for alimony and Husband had the ability to pay. In the October Judgment, the court found that Husband had an earning capacity of \$144,066.86, including his earnings from Huntsville Hospital of \$92,560.86 and \$51,500.00 imputed to him as income from FHA; the \$144,066.86 figure was used to set Husband's child support obligation as well as the amount of rehabilitative alimony. In the Final Judgment, the \$144,066.86 figure was used to calculate child support; the Final Judgment does not reflect the extent to which this figure was used in either the determination to make an award of transitional alimony or in setting the amount thereof.

Husband testified that he is paid bi-weekly at approximately \$3,560.00 per pay period for 26 pay periods, resulting in an annual income of \$92,560.00; this produces a monthly figure of \$7,713.33. On his Sworn Income and Expense Statement, Husband listed monthly expenses of \$6,320.26. Consequently, he has the ability to pay spousal support. In her Sworn Income and Expense Statement, Wife listed her monthly expenses as \$6,277.57. Husband asserts that Wife's expenses were overstated because they included the \$2,317.60 monthly mortgage payment on the marital residence that he had been paying prior to trial; Wife does not contest this.³ Excluding the mortgage payment from Wife's monthly expenses results in a figure of \$3,939.97.⁴ Husband contends that income should be imputed to Wife based on the fact that she went from potential earnings of \$60,000.00 to the \$18,500.00 she was paid at the time of trial; he suggests that the amount imputed should be \$36,000.00, but does not give a basis for that amount. As noted above, we have determined Wife's earning capacity to be \$28,000.00 per year or \$2,333.33 per month. Thus, Wife has a monthly deficit and a need for support.⁵ Having determined Wife's need for, and Husband's ability to pay, alimony, we then look to the record and statutory factors to determine the nature of the award.

³ Wife testified that Husband had been paying the monthly mortgage payment.

⁴ Husband contends that Wife's monthly expense figure includes \$885.00 which are expenses related to the parties' emancipated child, a student at the University of Alabama - Huntsville, living with Wife and commuting to school. Husband presents no argument and we see no reason why this amount should be disregarded in determining Wife's need.

⁵ Wife's monthly need would be greater if we were to consider the additional expense of one-half of the mortgage payment which the trial court ordered her to pay pending sale of the property.

“Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce....” Tenn. Code Ann. § 36-5-121(g)(1).

The trial court determined that an award of rehabilitative alimony was not necessary and that finding is not challenged on appeal. As noted previously, Wife is well educated and has extensive work experience in the accounting field. The record supports a determination that, for various reasons an award of transitional alimony is appropriate. This was a marriage lasting 23 years during which time either or both of the parties worked in order to raise their family and to achieve a modest standard of living; the decision, early in the marriage, for Wife to be a “stay-at-home” mom was a mutual one. For many years, employment and financial decisions were made by Husband and Wife by agreement. At the time of dissolution of the marriage, for which the court found both parties responsible, Wife had secured work outside of her field of study and prior work experience. In light of his medical challenges, Husband scaled back his plans to own and operate his own business in exchange for the certainty of income and benefits. The trial court’s division of the marital estate resulted in Wife receiving 54% and Husband receiving 46%. In light Wife’s education and experience, we agree that rehabilitation is not necessary; an award of transitional alimony, however, is clearly appropriate in this case, inasmuch as Wife will have to adjust to the economic consequences of the divorce.

While we affirm the determination of the court to award transitional alimony, we reverse the amount and duration of the award and remand for reconsideration based upon Husband’s earning capacity of \$92,560.86 per year and Wife’s earning capacity of \$28,000.00.

C. Attorney’s Fees

An award of attorneys’ fees in a divorce case constitutes alimony *in solido*. *Anzalone v. Anzalone*, No. E2006-01885-COA-R3-CV, 2007 WL 3171132, at *7 (Tenn. Ct. App. Oct. 30, 2007) (citing *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996)). When determining whether to award attorney’s fees, the trial court must consider the relevant factors regarding alimony set forth in Tenn. Code Ann. § 36-5-121(i). See *Echols v. Echols*, No. E2006-02319-COA-R3-CV, 2007 WL 1756711, at *7 (Tenn. Ct. App. June 19, 2007). As with alimony, need is a critical factor to be considered by the court when deciding whether to award attorney’s fees. *Eldridge v. Eldridge*, 137 S.W.3d 1, 24-25 (Tenn. Ct. App. 2002) (citing *Herrera*, 944 S.W.2d at 390). The question of whether to award attorney’s fees, and the amount thereof, are within the sound discretion of the trial court and we will not disturb the trial court’s decision on appeal absent an abuse of discretion. *Aaron*, 909 S.W.2d

at 411; *Anzalone*, 2007 WL 3171132 at *7 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002)).

At trial, Wife submitted an affidavit from her attorney stating in summary fashion that he had expended 107.75 hours through September 19, 2008 in his representation of Wife and that his “customary hourly rate” was \$250.00. In the October 2008 Judgment, the trial court ordered Husband to pay \$15,000.00 as alimony *in solido*, “representing an award of partial attorney fees incurred by [Wife] in this proceeding.”

In the Motion to Alter or Amend filed by Husband, he asserted that each party should be responsible for their own attorney’s fees because “[t]he Court found both parties entitled to a divorce,” “[Wife] [was] awarded a grossly disparate percentage of the marital estate,” “[t]here [wa]s no showing that [Wife] ha[d] insufficient assets with which to pay her attorney,” and he was awarded “an inconsequential amount of personal property.” The record does not contain a response to this motion from Wife and there is no indication that a hearing was held on the matter.

In the January 8, 2009, order, the court modified the award of fees by awarding Wife one-half of her attorney fees as alimony *in solido*; the Final Judgment entered on March 2, 2009 likewise recited that Wife “is awarded one-half (½) of her attorney’s fees as alimony in solido, in accordance with T.C.A. § 36-5-121 (i)(3), (4), (9), (11) and (12).” On March 2, Wife filed a motion asking the court to “state a numerical figure representing one-half of the attorney fees incurred by [Wife].” Attached to the motion was an affidavit from Wife’s attorney again stating in summary fashion that he had expended 185.25 hours through January 8, 2009, and that his “customary hourly rate” was \$275.00. In the April 3, 2009, order, the court awarded Wife attorney’s fees in the amount of \$25,471.87 - half of the fees reflected in Wife’s counsel’s second affidavit.

Husband asserts that the trial court erred in modifying its award of attorney’s fees to Wife “without the benefit of any testimony or affidavit concerning said attorney’s fees other than that previously presented to the court at trial.” Husband also contends that “Wife does not have a need nor does Husband have an ability to pay any alimony.”

Based upon our previous findings regarding Wife’s need and Husband’s ability to pay, we find that the trial court did not abuse its discretion in making an award of attorney’s fees to Wife as alimony *in solido*. Wife was in need of support following the divorce based on the amount of her monthly income and expenses. The trial court listed the statutory factors it considered in making the award, including the duration of the marriage, the age and mental

condition of the parties, the standard of living established during the marriage, and the fault of the parties.⁶

We find, however, that the trial court applied an incorrect legal standard in setting the amount of attorney's fees awarded to Wife, thereby abusing its discretion. In deciding attorney fee matters, the Tennessee Supreme Court has directed that trial courts are to consider the guidelines as delineated in *Conners v. Conners*, 594 S.W.2d 672 (Tenn. 1980) and the factors listed in S.Ct. Rule 8.⁷ *Keith v. Howerton*, 165 S.W.3d 248 (Tenn. Ct. App. 2004). "[T]he reasonableness of an attorney's fees will depend upon the particular circumstances of the individual case, as considered in light of the relevant guidelines." *Id.* "The 'determination of reasonable attorneys' fees and costs is necessarily a discretionary inquiry' by the Trial Court, to which the appellate courts will defer, absent an abuse of discretion." *Id.* at 250-51 (quoting *Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002)); see *Whitley v. Whitley*, No. E2008-00977-COA-R3-CV, 2009 WL 2242682 (Tenn. Ct. App. July 28, 2009). "A [c]ourt abuses its discretion when it 'either applie[s] an incorrect legal standard or reache[s] a clearly unreasonable decision, thereby causing an injustice to the aggrieved party.'" *Keith*, 165 S.W.3d at 251 (quoting *Kline v. Eyrich*, 69 S.W.3d 197, 204, 209 (Tenn. 2002)).

The only evidence in support of the original, modified and final awards of attorneys fees to Wife are the summary affidavits of her counsel. The trial court initially awarded Wife

⁶ Even though both parties were awarded a divorce on the ground of inappropriate marital conduct, as noted above, the court found that Husband's fault outweighed Wife's in precipitating the divorce for purposes of alimony.

⁷ The factors under Rule 8, Tenn. S. Ct. R., RPC 1.5 are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Tenn. S. Ct. R. 8, RPC 1.5.

\$15,000.00 and subsequently modified the award, entering judgment in the unspecified amount of one-half of Wife's attorneys fees. As a result of Wife's post-judgment motion, the court set the award of fees at \$25,471.87. The record does not show that the court considered the factors set forth in *Connors, supra*, and S.Ct. Rule 8 in addressing the fee application and Wife's counsel's failure to provide a detailed explanation of time expended and services performed deprived the trial court of the ability to determine that the amount requested was for services rendered that were reasonable and necessary.

Consequently, the award is vacated and the matter remanded for a reconsideration of the amount of attorney's fees to be awarded as alimony *in solido*.

III. Conclusion

For the reasons set forth above, this Court AFFIRMS the trial court's award of transitional alimony and alimony *in solido* to Wife. The court's findings regarding the parties' voluntary underemployment are REVERSED; the award of child support and the amount and duration of transitional alimony awarded are VACATED and REMANDED for reconsideration in light of our findings as to the respective earning capacities of the parties. Husband should be given a credit on future payments of child and spousal support for any overpayments brought about as a result of the recalculation of his earning capacity. The award of attorney's fees is VACATED and REMANDED for further consideration in accordance with this opinion.

Costs of this appeal are assessed against Husband for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE